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SALES AND CONVEYANCES WITHOUT DELIVERY OF POSSESSION.

DECISIONS UPON THE RULE IN TWYNE'S CASE SINCE 1866.

THE subject of fraudulent conveyances was reviewed and the decisions in the various states carefully collated by Mr. WALLACE, in the note to *Twyne's Case*, 1 Sm. Lead. Cas. It may prove of value to examine the later cases on this subject, decided within the past fifteen years, and note such changes as may have taken place within that time. The cases have all resolved themselves pretty generally into two classes.

1. Where retention of possession by the vendor or mortgagor is deemed fraudulent in law, *per se*, and, 2. Where retention of possession is *prima facie* fraud, but open to explanation, the force of which it is for the jury to decide.

In the first class many cases are governed by strictly construed statutes, passed with the object apparently of counteracting the tendency on the part of the courts to a relaxation of the rule in *Twyne's Case*. Of all these, California enforces the principle of fraud *per se* as rigidly as it is anywhere found. In *Woods* v. *Bugbey*, 29 Cal. 466 (1866), the rule is laid down. This was an action against the sheriff for damages, for seizing and taking in execution a brick-kiln, as the property of one O'Neill, which the plaintiff claimed as his by virtue of a sale. It was in evidence that no change of possession had taken place, but it was also found as a

matter of fact that the transaction was *bona fide* and free from actual fraud. The statute of California is as follows: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the person making such assignment or subsequent purchasers in good faith;" and sec. 17, "No mortgage of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee" (Laws 1850, p. 267). CURREY, J., delivering the opinion of the Supreme Court, says, that "the kind of possession which it was necessary for the mortgagee to have of the mortgaged property, to place it beyond the reach of the creditors of the mortgagor, was an actual possession. * * * What constitutes an actual and continued change of possession is well stated in *Stevens* v. *Irwin*, 15 Cal. 506, and in *Godchaux* v. *Mulford*, 26 Cal. 323," and quoting the opinion in *Lay* v. *Neville*, 25 Id. 552, the court there say, "It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control and ownership as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property." After further discussion, CURREY, J., said, "We think the case clearly within the mischiefs to prevent which the statute was passed, and that judgment ought to have been for the defendant instead of the plaintiff." There was a petition for a rehearing, and upon that the same judge delivered the opinion, in which he re-asserted his former position with greater vigor, making a comparison between the statutes and decisions of New York and other states and those of California, and concluding, "No excuse or explanation for want of an actual and continued change of possession can be entertained, and it is quite useless to cite decisions made under the statutes of Elizabeth, and of New York, or other states, allowing the want of an immediate delivery and an actual and continued change of possession to be explained or accounted for, as authoritative expositions of the rule which our statute has prescribed." See also as to what constitutes sufficient

change of possession: *Ford* v. *Chambers*, 28 Id. 13, and *Regli* v. *McClure*, 47 Id. 612.

Connecticut. In *Osborne* v. *Tuller*, 14 Conn. 529, all of the preceding cases were reviewed, and the note to *Twyne's Case* finds the result of the decisions to be that "the rule is one of policy and not of intention; that it is not enough that the jury find that the sale was *bona fide* and for a full consideration; though evidence of that is proper to be submitted to the jury to repel actual fraud, there must be shown some reason for the retention *legally* sufficient and satisfactory; the presumption of fraud is a presumption of law, and the law judges of the cases in which it does not arise, and the jury are to be instructed by the court as to the sufficiency of the facts, and reasons alleged to justify the retention." *Lake* v. *Morris*, 30 Conn. 201. "There is no rule, however, which enables a court to say, from one or more particular acts of intermeddling with property by the vendor after a sale, that they amount to the retention of the possession of it, so as to render the sale void as against creditors. The fact of such possession is indeed conclusive evidence of a colorable sale. But whether in fact there has been such a retention of possession must always be a question for the jury." The rule was stated more stringently in *Webster* v. *Peck*, 31 Conn. 495. In *Norton* v. *Doolittle*, 32 Id. 405, upon the point reserved for the court, it was held that there being a restoration of possession after a formal delivery, the sale was void, although the *bona fides* was not doubted, BUTLER, J., saying: "The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible and continued change of possession:" affirmed in *Hall* v. *Gaylor*, 37 Conn. 550 (1871), and *Hatstat* v. *Blakeslee*, 41 Id. 301 (1874). Mortgages not made in accordance with the requirements of the statute are void, where there is a retention of possession by the mortgagor, not only as against attaching creditors, but an assignee in insolvency: *Gaylor* v. *Harding*, 37 Conn. 508. But an executory contract, under which the vendee is allowed to have possession, with an agreement that the title shall not pass until the payment of a certain sum at a fixed time, will be sustained against the creditors of the vendee: *Hughes* v. *Kelly*, 40 Conn. 148.

In Delaware one case has recently been brought in the Superior Court, Fall Session, 1871, *Taylor* v. *Richardson*, 4 Houst. 300, in which GILPIN, C. J., charged the jury that to entitle the plaintiff in an action of replevin to recover the goods, which happened to be

machinery, they "must be satisfied that there was an actual sale of them by Scott to him, and that it was not a pretended sale merely, for the purpose of preventing his creditors from seizing them for the payment of his debts; and that they were delivered to him in a reasonable and convenient time after such actual sale to him; that is to say, as soon as it could conveniently have been done under the circumstances, with the exercise of due and proper diligence and attention on his part for that purpose. * * * And if they were satisfied on both those points that such was the case, their verdict should be for the plaintiff, but if not, for the defendant;" a charge which seems entirely in accord with the Delaware statute, which enacts that the sale shall be void except as against the vendor, unless there shall be an actual delivery "as soon as conveniently may be after the making of such sale."

In Florida the only case reported within the past ten years appears to be *Smith and Wife* v. *William Hines*, 10 Fla. 258, in which it was held that fraud might be inferred from the circumstances, as, whether the vendor keeps the bill of sale or retains possession of the goods or any part of them.

Illinois maintains pretty closely the rule of ten years ago: *Tickner* v. *McClelland*, 84 Ill. 471; *Allen* v. *Carr*, 85 Id. 388. It has been held that if delivery has been made to the vendee upon secret conditions they cannot bind a *bona fide* purchaser: *W. U. Railroad Co.* v. *Wagner*, 65 Ill. 197; *Young* v. *Bradley*, 68 Id. 553. And although it is necessary as matter of law that there shall be an *actual change* of possession, it is not necessary to a complete transfer that the vendee should remain in possession. If, after the delivery to the purchaser, he subsequently returned it to the vendor, it may be a circumstance tending to show only a colorable transaction, more or less cogent, according to the circumstances. But it certainly may be explained: *Wright* v. *Grover*, 27 Ill. 426. If a mortgagor of horses keep them in his possession, the mortgage is bad as against a subsequent *bona fide* purchaser or mortgagee: *McCormick* v. *Hadden*, 37 Ill. 370, and if possession remain with the mortgagor after maturity creditors are not bound: *Hanford* v. *Obrecht*, 49 Ill. 146; *Lemen* v. *Robinson*, 59 Id. 115. But retention of possession after a judicial sale does not render it void: *Hanford* v *Obrecht*, *supra*. Under the revised statutes a loan of personal property is good for five years: *Peters* v. *Smith*, 42 Ill. 417.

Iowa seems not to have been noticed in the note to *Twyne's*

Case. The code of Iowa provides that as against existing creditors a sale of chattels, where the vendor remains in possession, is invalid, unless a written instrument conveying the same is duly executed, acknowledged and filed of record. This act has been strictly construed, and where there was no record it has been held void: *Prather & Parr* v. *Parker*, 24 Ia. 26. It seems from a very recent case that possession alone constitutes fraud, unless the act has been complied with, and that the *bona fides* of the transaction does not affect subsequent creditors: *Boothby & Co.* v. *Brown*, 40 Ia. 104. "If, therefore, the property be left with the seller, whose relations to it continue unchanged so far as the world may know by the acts of the parties, the possession will be regarded as continuing in him:" BECK, J., Ib. But where one becomes a creditor subsequent to a mortgage, and after notice of the same, the mortgage is good against him, upon the theory which prevails in all cases under the recording acts, that recording is merely constructive notice, and intended to take the place of actual notice: *McGavran* v. *Haupt*, 9 Ia. 83. It has been expressly held that possession may be retained where the terms of the act have been complied with: *Kuhn* v. *Graves*, 9 Ia. 303. But even under a recorded bill of sale, if anything remains to complete the sale, as to fix the quantity or price, as in the case of the sale of growing crops, it is void as against a subsequent execution: *Snyder* v. *Tibbals*, 32 Ia. 447. And when there has been no recorded instrument, but the price paid and property left with the vendor to finish, as in the case of a buggy, such possession is fraudulent in law against a *bona fide* mortgage: *Hesser & Hale* v. *Wilson*, 36 Ia. 152.

In Kentucky, it was said by HARDIN, J., in *Morton* v. *Ragan & Dickey*, 5 Bush 334 (1869), "The principle is well settled, as applicable to private sales of movable property, that the possession must accompany the title, or the sale will be *per se* fraudulent and void in law as to subsequent purchasers and creditors of the vendor, even though the contract contains a stipulation that the seller is to retain the possession until a future day: *Brummel* v. *Stockton*, 3 Dana 135; *Robbins* v. *Oldham*, 1 Duvall 28." But the same case held that the rule did not apply to property not liable to execution. Where the property is not identified as a sale of so many of a number of barrels of whiskey in a bonded warehouse, no title passes as against an execution: *May* v. *Hoaglan*, 9 Bush 171. Secret conditions that title shall not vest in the vendee until payment of the

purchase-money, are void as against subsequent creditors or purchasers of the vendee: *Vaughn* v. *Hopson*, 10 Bush. 337. See also *Greer* v. *Church & Co.*, 13 Id. 430.

In Maryland, which was originally classed among the states holding retention of possession, in case of sales, fraudulent in law, no change seems to have taken place. In *Kreuzer* v. *Cooney*, 45 Md. 582, it was held that the recording of a bill of sale, as required by the code, was equivalent to transfer of possession. *Thompson et al.* v. *Baltimore & Ohio Railroad Co.*, 28 Md. 396, is an interesting case, in which it was said that constructive delivery of iron was sufficient to pass the title; but it was held, that the vendor's lien was not thereby lost in case of the vendee's insolvency.

In Missouri, the law has undergone several changes. In the earlier cases, as was said in the note to *Twyne's Case*, the principle of that case was closely followed; but subsequent decisions tending to make the question one of *bona fides*, somewhat unsettled the rule, until the statute of 1855 practically declared the law to be as pronounced in *Shepherd* v. *Trigg*, 7 Mo. 151. But in 1865 a new law was passed, changing the original act by the insertion of a section which declared that "every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by actual and continued change of the possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith:" Wagner's (Mo.) Statutes 281, § 10. This, as was said by WAGNER, J., in *Claflin* v. *Rosenberg*, 42 Mo. 439 (1868), cited in *Allen* v. *Massey*, 17 Wall. 351, practically unsettled the law of the previous twenty years and restored the ancient rule; and under this statute it has been uniformly held that the *bona fides* of the transaction need not be determined by the jury, unless they first find that there has been some open, notorious or visible act, clearly and unequivocally indicative of delivery and possession, and that not a joint or concurrent possession: *Lesem* v. *Herriford*, 44 Mo. 323; *Bishop* v. *O'Connell*, 56 Id. 158; *Burgert* v. *Borchert*, 59 Id. 80 (1875). What is a "reasonable time" must be determined by the circumstances of each case: *Bishop* v. *O'Connell*, *supra*. Nor will a *bona fide* purchaser from the vendee stand in any better position than the original vendee: *Lesem* v. *Herriford*, *supra*. It seems to be settled that, under the statute, in case of chattel mortgages,

either possession or recording is essential: *Bevans* v. *Bolton*, 31 Mo. 437.

In Pennsylvania, *Clow* v. *Wood*, the leading case up to 1855, was recognised as the highest authority in 1870 by SHARSWOOD, J., in *McKibbin* v. *Martin*, 14 P. F. Smith 356. "*Clow* v. *Wood*, 5 S. & R. 275, decided by this court in 1819, is the magna charta of our law upon this subject. * * * It established that retention of possession was fraud in law wherever the subject of the transfer was capable of delivery, and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. * * * Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. The court is the tribunal to judge whether there is sufficient evidence to justify the inference of such a delivery." This case decided that where there was *actual delivery* it was a question of fact for the jury whether all that was necessary had been done, or whether there was any deception practised in effecting the change. *Vide*, also, *Bentz* v. *Rockey*, 19 P. F. Smith 71. The character of the property and the circumstances of the transfer will be taken into consideration by the court, and the jury will be allowed to judge whether all that was necessary to be done has been done *Haynes* v. *Hunsicker*, 2 Casey 58; *Dunlap* v. *Bournonville*, Id. 72; *Barr* v. *Reitz*, 3 P. F. Smith 256; *Long* v. *Knapp*, 4 Id. 514; *Billingsley* v. *White*, 9 Id. 464; *McMarlan* v. *English*, 24 Id. 296; *Bond* v. *Bronson*, 30 Id. 360; *Sheldon* v. *Sharpless*, 2 W. N. C. 311. The strict rule is not without its exceptions. A *bona fide* sale of goods in the hands of a bailee by the vendor is good against the vendor's creditors, unless the vendor re-take possession before the vendee: *Worman* v. *Kramer*, 23 P. F. Smith 378; *Woods* v. *Hull*, 1 W. N. C. 442. The transfer must be *actual*, *continuing* and *exclusive* in the vendee; *concurrent* possession is evidence of fraud: *Miller* v. *Garman*, 19 P. F. Smith 134; *Brawn* v. *Keller*, 7 Wright 104; *Steelwagon* v. *Jeffries*, 8 Id. 407; *Dewart* v. *Clement*, 12 Id. 413; *Garman* v. *Cooper*, 22 P. F. Smith 32; *Worman* v. *Kramer*, *supra*; *McMarlan* v. *English*, *supra*.

Where from the nature of the case *exclusive* possession is impossible, *e. g.*, a post-nuptial settlement by a husband upon his wife, concurrent possession is not fraudulent: *Larkin* v. *McMullin*, 13 Wright 29. Assignments recorded within the thirty days allowed

for recording are not within the principle of *Twyne's Case: Dallam* v. *Fitler*, 6 W. & S. 323, approved in *Whitney's Appeal*, 10 Harris 505; *Heckman* v. *Messinger*, 13 Wright 473; *Marks's Appeal*, 4 Norris 231.

The distinction drawn in *Lehigh Co.* v. *Field*, 8 W. & S. 232, between conditional sales and bailments, as evidenced by *Martin* v. *Mathiot*, 14 S. & R. 214, and that case, has been maintained, notwithstanding the editor's note to the contrary in Smith's Leading Cases. Delivery of possession, with a reservation that the vendor may recover possession upon failure to pay all of the purchase-money, or with a lien reserved by the vendor, is fraudulent as against creditors of the vendee or *bona fide* purchasers from him: *Haak* v. *Linderman*, 14 P. F. Smith 499; *Waldron* v. *Haupt*, 2 Id. 408; *Euwer, Assignee, &c.*, v. *Van Giesen et al.*, 6 W. N. C. 363. Bailments, where the right of possession is not parted with, and no actual sale has taken place, but only an agreement to sell at a future time, are not fraudulent in law: *Chamberlain* v. *Smith*, 8 Wright 431; *Rowe* v. *Sharp*, 1 P. F. Smith 26; *Becker* v. *Smith*, 9 Id. 469. If the vendee allows the vendor to remain in possession, or after delivery immediately gives him possession, and the vendor sells to a *bona fide* purchaser for value without notice, the purchaser can hold the goods. It is held that this is common law and not dependent upon the statute: *Shaw* v. *Levy*, 17 S. & R. 99; *Davis* v. *Bigler*, 12 P. F. Smith 242: Per SHARSWOOD, J.

But "retention of possession by the former owner of a chattel sold at sheriff's sale, is not an index of fraud, because the sale is not the act of the persons retaining, but of the law; and because a judicial sale, being conducted by the sworn officer of the law, shall be deemed fair till it is proved to be otherwise. * * * A chattel thus purchased, then, may safely be left in the possession of the former owner on any contract of bailment the law allows in any other cases:" *Myers* v. *Harvey*, 2 Penn. 478; *Craig's Appeal*, 27 P. F. Smith 448.

In *Coble* v. *Nonemaker*, 28 P. F. Smith 501, it is said that a chattel mortgage without change of possession is void as to creditors, but the *decision* was that a purchaser with notice could not take advantage of the defect. See also *Euwer* v. *Van Giesen*, *supra*. By the Act of May 18th 1876, P. L. 181, mortgages in writing and duly acknowledged, for any sum not less than $500, upon lumber, iron and coal oil in bulk, iron tanks, tank cars, iron

ore mined and prepared for use, manufactured slate and canal boats, are valid when properly recorded: but unless renewed, the time lasts but one year.

In New Hampshire the rule laid down in the federal courts and declared in *Coburn* v. *Pickering*, 3 N. H. 415, still prevails, and *Coburn* v. *Pickering* has been supported by numerous subsequent decisions, to the effect that when the secret trust has been established, the fraud *ipso facto* follows, as a conclusion of law, without regard to the intention of the parties: *Coolidge* v. *Melvin*, 42 N. H. 510; *Shaw* v. *Thompson*, 43 Id. 130; *Lang* v. *Stockwell*, 55 Id. 561; *Cutting* v. *Jackson*, 56 Id. 253 (1875). The act requiring a chattel mortgage to be recorded is still in force, and when there is a retention of possession without recording it, is void in law: *Piper* v. *Hilliard*, 52 N. H. 209; *Putnam* v. *Osgood*, 51 Id. 192; and where there is an agreement that the mortgagor may sell the goods for his own benefit, such a secret trust will render the mortgage void, even though entered into after the mortgage has been completed; but possession by the mortgagee will answer instead of recording: *Janvrin* v. *Fogg*, 49 N. H. 340.

(2.) The second class into which we have divided the cases comprises the larger number of the state courts, in which it is the rule that the question of fraud is one of fact for the jury; and, although the retention of possession raises a presumption of fraud, it may be rebutted by proof of the *bona fides* of the parties.

In Alabama, in *Mayer* v. *Clark*, 40 Ala. 259 (1866), BYRD, J., held that, "Where the possession of a chattel remains with the vendor, it is, as to creditors, a badge of fraud simply and not fraud *per se*: *Hobbs* v. *Bibb*, 2 Stew. 54. 336; 5 Ala. 531, 780; 14 Id. 814; 24 Id. 219. Possession remaining with the vendor, unexplained, is *prima facie* evidence of fraud, and if consistent with good faith and the absolute disposition of property, and the transaction is *bona fide* throughout, then the title passes by the contract of sale, notwithstanding the possession remains with the vendor: *Millard's Adm'rs* v. *Hall*, 24 Ala. 219. * * * The true rule would seem to be that possession of personal property after a sale remaining with the vendor, is a badge of fraud, which, if unexplained, would be sufficient to authorize a verdict against the vendee. But if explained, as required in the case of the *Bank* v. *Borland*, 5 Ala. 539, then the title of the vendee will not be affected by the possession of the vendor." *Wyatt* v. *Stewart*, 34 Ala. 721 (1859), held "that the retention of possession after the sale by a maker

of a deed of trust of property sold upon notice at public outcry by the trustee, is not *prima facie* evidence of fraud: *Montgomery* v. *Kirksey*, 26 Ala. 172; *Maulden & Terrell* v. *Mitchell*, 14 Id. 814."

SAFFOLD, J., said, in *Moog* v. *Benedicks*, 49 Ala. 512 (1873), that it was error to charge that a vendor's remaining in possession of the goods and selling them as before, was such a badge of fraud as could only be overcome by proof of compensation paid to him as the vendee's agent. "If he acted without reward it would only have been a circumstance indicative of fraud, but not inconsistent with good intention." And see *Crawford et al.* v. *Kirksey et al.*, 55 Id. 282.

Arkansas. Possession by the vendor after the sale, if connected with explanatory facts, is not sufficient to sustain a charge of fraud; and it was even held error to introduce evidence to affect the bill of sale, or to show that the transaction it witnessed was anything else than the bill of sale recited: *George* v. *Norris*, 23 Ark. 121 (1861). Where from the character or situation of the property, actual delivery is impossible, a constructive delivery will suffice: *Puckett* v. *Reed*, 31 Id. 131; *Trieber* v. *Andrews*, Id. 163.

Indiana. The Statute of Frauds expressly declares that the question of fraudulent intent shall be one for the jury. "If there was not an actual, visible and continuous change of possession, the transaction was *prima facie* fraudulent, but upon that point * * * the question of fraudulent intent was for the jury:" *Nutter* v. *Harris*, 9 Ind. 91; *Kane* v. *Drake*, 27 Id. 29. But where the instrument evidencing the sale or mortgage is on its face fraudulent, the court may declare it so without referring to the jury: *Jenners* v. *Doe*, 9 Ind. 461. Relied on in *Robinson* v. *Elliott*, 22 Wall. 522 (1866). "The retention by the vendor of the possession is *prima facie* evidence of fraud, and throws on the party who would sustain the sale, the burden of rebutting the presumption of fraud arising from such continued possession by the vendor, and in the absence of such explanatory proof, fraud is inferred from the fact that the vendor retains the possession, and it was proper that the court should so charge the jury:" *Kane* v. *Drake*, *supra*.

Louisiana is not cited in the note to *Twyne's Case*. The Code provides, art. 1916, "If the vendor, being in possession, should by a second contract, transfer the property to another person, who gets the possession before the first obligee, the last transferee is considered as the proprietor, provided the contract be made on his part *bona fide* and without notice of the former contract." Art.

1917, "If personal property be transferred by contract, but not delivered, it is liable in the hands of the obligor" (vendor) "to seizure and attachment in behalf of his creditors." Other parts of the code define what is possession, and in *McCloskey* v. *Central Bank of Alabama*, 16 La. Ann. 284, these sections are construed in connection with art. 2456 C. C., in which it is said that, "In all cases where the thing sold remains in the possession of the seller because he has reserved to himself the usufruct or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith and establish the reality of the sale. It was held that while the failure of the vendee to take possession might, under the terms of the last clause, be explained, a failure to show the title of the vendee in any way would be within the terms of the preceding sections, and that such a sale was void as against an execution. See, also, *Jorda* v. *Lewis*, 1 La. Ann. 59; *McCandlish* v. *Kirkland*, 7 Id. 614; *Zacharie* v. *Kirk*, 14 Id. 433. It seems therefore that the distinction drawn is between those cases in which the vendor is allowed to remain in possession under a contract or by a precarious title, and those in which he is allowed to remain by mere neglect. In the former cases, the fact is open to explanation, in the latter the presumption cannot be rebutted by proof of good faith. The presumption raised by art. 2456 C. C. must be rebutted by strong evidence: *Bernard* v. *Auguste*, 6 La. Ann. 24; *Nichols* v. *Botts*, 6 Id. 437; *Keller* v. *Blanchard*, 19 Id. 53; *Sullice* v. *Gradenigo*, 15 Id. 582. But *bona fides* and transfer of possession may be shown, sufficient to repel the presumption: *Miltenberger* v. *Parker*, 17 Id. 254.

In Massachusetts, no change has taken place in the rule that the retention of possession is merely evidence of fraud for the jury: *Ingall* v. *Herrick*, 108 Mass. 351 (1871), where a number of cases are cited.

In Maine, it is the province of the court to say what is delivery sufficient to constitute a good sale: *Bethel Steam Mill Co.* v. *Brown et al.*, 57 Me. 9; *Fairfield Bridge Co.* v. *Nye*, 60 Id. 372; *Mosher* v. *Smith*, 67 Id. 172. In the case of a sale by a husband to his wife, although no actual fraud was alleged, it was held that there should have been some formal delivery to evidence the change of title: *McKee* v. *Garcelon*, 60 Id. 165. But in *Googins* v. *Gilmore*, 47 Id. 9, the lower court was affirmed in its refusal to enter a nonsuit in the case of a mortgage of perishable property, in which it

was agreed that the mortgagor should remain in possession, and it was held to be a question for the jury: see also *Emmons* v. *Bradley*, 56 Id. 333, in which it is said, quoting from the opinion in *New England Ins. Co.* v. *Chandler*, 16 Mass. 279, "in the case of a bill of sale or other conveyance of property apparently absolute, proof of any secret trust or agreement inconsistent with the tenor of the agreement [conveyance] is undoubtedly evidence of a fraudulent bargain made for the purpose of defeating or delaying creditors. This is mentioned in *Twyne's Case* as one of the badges of fraud. But it is not fraud in itself or conclusive evidence of fraud." Conversely a sale and delivery with a secret stipulation that the title shall not vest until payment of the purchase-money is void against attaching creditors of the vendee: *Boynton* v. *Libbey*, 62 Me. 253.

In Michigan it has been frequently held and asserted that the statute changed the old rule, and made the question of fraud always one for the jury: *Jackson* v. *Dean*, 1 Doug. 519; *Bragg* v. *Jerome*, 7 Mich. 145; *Gay* v. *Bidwell*, Id. 519. But in *Hatch* v. *Fowler*, 28 Id. 205 (1873), it was held to be error to have refused to charge the jury that in the case of retention of possession, "such sale would be deemed fraudulent and void as against the creditors," upon the ground that, by this rule, the jury were to determine whether sufficient had been shown to rebut such a presumption, and that, as a rule of evidence for the *jury*, it held good. A chattel mortgage recorded in accordance with the statute, is valid: *People* v. *Bristol*, 35 Mich. 28.

The Minnesota Statutes at Large 692, § 15, provide that retention of possession shall be deemed fraudulent and void, "unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors or purchasers," which seems to make the question clearly one for the jury: *Blackman* v. *Wheaton*, 13 Minn. 326 (1868).

In Mississippi, *Comstock* v. *Rayford*, 20 Miss. 369, seems to have been decided upon the principle that retention of possession was only *prima facie* evidence of fraud, and the *onus probandi* is thrown upon the vendee: *Carter* v. *Graves*, 6 How. 9, and *Rankin* v. *Holloway*, 3 S. & M. 614. In the case of public forced sales, fraud is purely a question of fact, and it was held error, in such a case, to instruct the jury that if there was not such an exclusive possession by the vendee the sale was "collusive and fraudulent, * * *

unless satisfactorily explained:" *Garland* v. *Chambers*, 11 S. & M. 337, and *Ewing* v. *Cargill*, 13 Id. 79. Recording a mortgage is equivalent to an actual delivery: *Hundley* v. *Buckner*, 6 Id. 70. But retention of possession is not *per se* fraudulent: *Hilliard* v. *Cagle*, 46 Miss. 309. Nor is a conditional sale: *Ketchum & Cummins* v. *Brennan*, 53 Id. 594.

New York. In New York the current of the later cases in the Court of Appeals seems to have been pretty definitely settled in the course given to it by *Hanford* v. *Artcher*, 4 Hill 272, by the old Court of Errors; and even the Supreme Court, with whom the disagreement was at first so great after the passage of the Revised Statutes in 1830, seems to have acquiesced in the rule, that although retention of possession is presumptive evidence of fraud, it is nevertheless a question for the jury, and not the judge, to decide. In *Mathews* v. *Poultney*, 33 Barb. 127 (1860), the facts, as found by the judge before whom an action to set aside an assignment was tried at special term, were that the assignor of the stock, &c., of a grocery store was allowed to remain in possession; that he conducted the business for the assignee, without any compensation; that the sign over the store remained as before in the name of the assignee, and that there were various other circumstances, which, unexplained, would have been conclusive evidence of fraud; but, upon the weight of all the evidence, "the justice was unable to discover any actual fraud." On appeal to the Supreme Court, the court say: "Taking possession of the assigned property, an actual and continued change of the possession and all analogous facts, are but facts, the absence of which shows or tends to show a fraudulent intent in the making of the assignment. And the evidence as to such facts, like that which may be offered as to facts prior to, and immediately connected with, the making of the assignment, is left for both its credibility and its weight to the tribunal (whether judge or jury) which tries the questions of fact;" cited approvingly in *Juliand* v. *Rathbone*, 39 Barb. 102. In the Superior Court, in *Stewart* v. *Slater*, 6 Duer 83, "the paramount and controlling authority" of *Hanford* v. *Artcher*, was adverted to. *Vide Champlin* v. *Johnson*, 39 Barb. 608; *Johnson* v. *Curtis*, 42 Id. 588, and *Spicer* v. *Waters*, 65 Id. 233 (1866). And the Court of Appeals, although originally not decidedly affirming *Hard* v. *Anfrotcher*, follows the same line of authority, and regards the *intent* as the only real ground for holding retention of possession to be fraud. *Ball* v. *Loomis*, 29 N. Y. 415 (1864): "Such facts are presump-

tive evidence of fraud and conclusive, unless rebutted by affirmative evidence of good faith and the absence of an intent to defraud."

Mitchell v. *West*, 55 N. Y. 107 (1873), was an action for the alleged conversion of personal property. The property was left after the sale in the vendor's possession and was levied upon by virtue of a writ of execution against the vendor by the defendant. Upon the trial the court was asked to charge that it was the duty of the vendee (the plaintiff) to give some reason, which the court could approve, for his allowing the goods to remain in the vendor's possession, which the court refused. On appeal, RAPALLO, J., said, "The principal point urged on the part of the appellant is, that in addition to proof that the sale of the chattels was *bona fide*, and that there was no intent to defraud the creditors of the vendor, it was necessary to show some valid excuse or reason for leaving the property in his possession; or stated in another form, that the absence of intent to defraud creditors cannot be established without showing a good reason for the want of change of possession. We regard this point as settled by the decision of the Court of Errors in *Hanford* v. *Artcher*, 4 Hill 271." To the same effect see *May* v. *Walter*, 56 N. Y. 8, and *Tilson* v. *Terwilliger*, Id. 273. In *May* v. *Walter*, indeed, the case was referred back to the jury, overruling the charge of the court below, that evidence of a fair price having been paid was sufficient to establish the *bona fides*.

New Jersey seems to have been singularly free from cases involving this point since 1866, but *Runyon* v. *Groshon*, cited in the note to *Twyne's Case*, is re-affirmed in *Parr* v. *Brady*, 8 Vroom (37 N. J.) 201. After referring to *bona fide* purchasers as affected by chattel mortgages, BEDLE, J., says, "In favor of the latter," (*bona fide* purchasers) "the only judicial question has been whether, if there is no change in the possession of the property, that fact is to be considered as *prima facie* evidence of fraud. That, however, is only a matter of evidence, and does not affect the validity of the instrument if there is no fraud. The possession can always be explained. Assuming our common-law rule to be as held in *Runyon* v. *Groshon*, 1 Beasley 87, the New Jersey Statute of Frauds provides for the recording of chattel mortgages 'unaccompanied by immediate delivery and actual and continued change of possession,' and makes void as against creditors those not recorded.

North Carolina still belongs to this class, as the rule was originally laid down in *Rea* v. *Alexander*, 5 Ired. 644. At least no subsequent case seems to have overruled or doubted it.

In Ohio, *Collins & McElroy* v. *Myers*, 16 Ohio 547, cited in the note to *Twyne's Case*, to hold "that a continuance of possession, with a power of disposition and sale on the part of the mortgagor, either expressed or implied, is necessarily fraudulent and void as against creditors, as such a mortgage is no security to the mortgagor and of no effect but to ward off other creditors," has been explained in *Kleine, Hegger & Co.* v. *Katzenberger & Co.*, 20 Id. 110, to mean that it is the power of disposition retained by the mortgagor "*for the mortgagor's own benefit*," and where "the power of sale is such as to leave in the mortgagor a dominion over the property, inconsistent with the alleged lien of the mortgage that the latter has been held *per se* fraudulent and void." But where the mortgagor merely acts as agent for the mortgagee it is for the jury to determine the *bona fides* of such an arrangement: Ib. Nor will the acquiescence by the mortgagee in a subsequent sale of the mortgaged property render the mortgage void, unless at the time the mortgage was given such an understanding existed: *Clark* v. *Morris*, 2 Am. Law Record 364.

In Rhode Island it was held not to be error to instruct the jury that a bill of sale of a farm and utensils made by an insolvent to a relative, where possession was retained by the vendor and his family, was *prima facie* evidence of fraud. In the opinion in the Supreme Court, BULLOCK, J., said that there could be no doubt that the facts as above stated "when proved, tend to show such sale merely colorable, not conclusive of course, but circumstances proper for the jury to weigh, and from which, in the absence of explanatory evidence, they may infer that such sale is in fact fraudulent:" *Sarle Arnold*, 7 R. I. 582; certainly not a very harsh rule of evidence when the circumstances of that case are considered.

In Texas, OGDEN, P. J., said (*Thornton* v. *Smith*, 39 Tex. 544): "If it be admitted that the assignor retained possession or concurrent possession with one of the assignees, still this would be at most only a badge of fraud, susceptible of explanation, and which we think was fully explained by the testimony in harmony with the claim of a *bona fide* transaction."

Wisconsin. The statute of this state has been pretty strictly enforced, by requiring such an "actual" change of possession as the statute contemplates, in order to rebut the presumption of fraud. It means such a change, that the vendor ceases to possess the goods in any capacity whatever: *Grant* v. *Lewis*, 14 Wis. 187. In *Osen* v. *Sherman*, 27 Wis. 505 (1871), LYON, J., said, "The

portions of the general charge to which exceptions were taken, are to the effect that, if, after the sale by Lang to the plaintiff, they held possession of the property conjointly, or if Lang continued in possession thereof as the agent of the plaintiff, or if the plaintiff permitted Lang to remain in possession thereof and control the business, the presumption of fraud attached, and the burden was upon the plaintiff to remove such presumption by evidence. We think that the circuit judge stated the law in that behalf correctly to the jury; for how can it be said that there is 'an actual and continued change of possession' from the vendor to the purchaser of the thing sold, if such vendor still has dominion over it, either conjointly with the purchaser, or as his agent, or the manager of his business? We find no error in the charge of the court."

But "there may undoubtedly be an honest sale, and the vendor left in possession in good faith as the vendee's agent. But it looks so much the other way, on the face of it, without explanation, that the statute makes the mere fact of the continued possession of the vendor presumptive evidence of fraud, and conclusive, unless the purchaser shows, by satisfactory evidence, that there was really no intent to defraud, that burden being thrown upon him." PAINE, J., in *Grant* v. *Lewis*.

Nearly all of the decisions upon the question in which it has been theoretically discussed in the Supreme Court have arisen on appeal from the Circuit Court of the District of Columbia; and where this has not been the case, under these last decisions of the United States Supreme Court, the laws of the respective states were held to govern. *Allen* v. *Massey*, 16 Wall. 351, an appeal from the Circuit Court of Missouri, was a case in which the parties to the transaction lived in the same house. A sale of household furniture was made by one to the other, both using the furniture alike, and exactly as before. The assignee in bankruptcy of the vendor having filed a bill to have the sale annulled, the District Court of Missouri rendered a decree to that effect; this decree was affirmed by the Circuit Court and the defendants appealed. Mr. Justice FIELD, delivering the opinion, said: "The sale was within the terms of the statute fraudulent and void as against Downing's creditors. * * * In the case of *Claflin* v. *Rosenberg*, 42 Mo. 439, where the vender had become clerk of the purchaser, the Supreme Court of Missouri held that the possession which the purchaser was required to take of the property sold, in order to

render the sale valid under the statute must be open, notorious and unequivocal. * * * The statute being a local one, applying only to sales in Missouri, the court will follow the construction given to it by the highest court of the state." And in *Robinson* v. *Elliott*, 22 Wall. 513, where the question arose under a chattel mortgage in Indiana, and the statute of the state was relied on, the court took great pains to ascertain the construction of the statute in that state, and Mr. Justice DAVIS says, in the opinion, "Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the *New Albany Insurance Co.* v. *Wilcoxson*, 21 Ind. 355, would seem to imply, that when such a case did arise, it would be decided in accordance with the views we have presented," and the court in its judgment, was governed by the tendency of the state court.

N. D. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

STATE v. TATRO.

The application of the common law rule, that a criminal offence is neither excused nor mitigated by the voluntary intoxication of the person who commits it, in trials for murder, is not affected by No. 44, Acts of 1869, making degrees of murder.

Thus, where it appears on trial for murder that the murder was done by some kind of wilful, deliberate, and premeditated killing other than by means of poison or by lying in wait, the degree of the offence is not lessened by proof that at the time it was committed the respondent was intoxicated, any more than it would be if it had been perpetrated by means of poison or by lying in wait.

INDICTMENT for the murder of Alice Butler, on the evening of June 2d 1876. At about 7 o'clock in the evening of the day of the alleged murder, Charles Butler, the husband of the murdered woman, left his house to go to a neighboring village, leaving behind the respondent, who was then at work for him, as he had been at intervals for two or three years before that time. On entering his house on his return at about 9 o'clock, he found the dead body of his wife lying on the floor, with marks of blows from some heavy instrument on the head.

The evidence on the part of the respondent tended to show that at the time of the alleged murder, the respondent was laboring under delirium tremens, acute mania, or some form of delirium resulting from excessive use of alcoholic drink, whereby he was